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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 476

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JUNE 25, 1924

(30,441)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1924

[fol. 1] COURT OF CLAIMS OF THE UNITED STATES

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY, a Corporation,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On April 5, 1923, the plaintiff filed its original petition.

On May 26, 1923, the defendant filed a demurrer to said petition.

Subsequently, to wit, on February 19, 1924, by leave of court, the plaintiff filed an amended petition. Said amended petition is as follows:

II. AMENDED PETITION AND EXHIBITS—Filed Feb. 19, 1924

To the Honorable the Court of Claims:

The claimant, Hamburg-American Line Terminal & Navigation Company, respectfully represents:

1. That claimant is a corporation created by and existing under the laws of the State of New Jersey; that a copy of its Certificate of Incorporation, marked Exhibit "A," is hereunto annexed and made a part hereof; that it was organized on the twenty-sixth day of October, A. D. 1899, to exercise and perform the powers conferred upon it by said laws and to carry on any business or occupation necessary and proper to effectuate any or all of the objects for which it was formed; that from the date of such organization until a declaration of war by the United States of America against the Imperial German Government on the sixth day of April, A. D. 1917, made trading with Germany and its nationals unlawful on the part of persons in the United States, claimant was a subsidiary corporation [fol. 2] of the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft, a German corporation engaged in the business of maritime transportation and known commonly in said business as the "Hamburg-American Line," in that all of the issued and outstanding capital stock of claimant was during such period beneficially held for said German corporation; that said stock continued to be so held until sometime in or about the month of December, A. D. 1917, when said stock was seized and taken over by the Alien Property Custodian, and has since then been held under the control and management of said Alien Property Custodian, pursuant to the provisions of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, the amendments thereto and the Executive Orders issued in pursuance thereof; and that all members of claimant's board of directors, as at present constituted, hold office as such by virtue of their having been regularly elected directors by

the vote of the said Alien Property Custodian and his nominees at a stockholders' meeting held at claimant's registered office, No. 15 Exchange Place, Jersey City, New Jersey, on the sixth day of September, A. D. 1922.

2. That prior to the sixth day of April, A. D. 1917, by expenditures amounting in the total to one hundred twenty thousand, six hundred and fifty-nine dollars ($120,659.00), claimant acquired title to and became the owner of two tug-boats (steam screws), a launch (steam screw), a barge, and a coal hoister, all of which floating craft, were used in claimant's business, carried on in the Port of [fol. 3] New York, until they were requisitioned by the Government of the United States, as hereinafter mentioned, when said floating craft had a market, or commercial, value estimated at one hundred eighty-four thousand, one hundred and twenty-four dollars and sixty-six cents ($184,124.66). Said floating craft are more particularly described as follows:

(a) Name of Vessel: "Hamburg-American Line No. 2," Ex-Frank Steers.
Official Number: 200449.
Documented under Permanent Enrollment, No. 160, at New York, on November 27, 1912.
Built at Tottenville, N. Y., in 1903, by Brown Shipbuilding Co.
Rig: Steam screw.
Gross Tonnage: 52. Net Tonnage: 35.
Length: 60.0 feet. Breadth: 17.8 feet. Depth: 7.6 feet.
Service: Towing.

Original Cost, to Claimant $14,700.00
Commercial Value, April 6, 1917 ..... $10,640.00

(b) Name of Vessel: "Hamburg-American Line No.3."
Official Number: 211187.
Documented under Permanent Enrollment, No. 563, at New York, on May 3, 1913.
Built at Port Richmond, N. Y., in 1913, by Staten Island Shipbuilding Company.
Rig: Steam screw.
Gross Tonnage: 284. Net Tonnage: 193.
Length: 111.8 feet. Breadth: 27.6 feet. Depth: 14.4 feet.
[fol. 4] Service: Freight. Indicated Horsepower: 1,100.

Original Cost, to Claimant $77,179.00
Commercial Value, April 6, 1917 ..... $124,644.10

(c) Name of Vessel: "Hamburg-American Line No. 4."
Official Number: 211619.
Documented under Permanent Enrollment, No. 79, at New York, on October 24, 1913.
Built in New York, N. Y., in 1913, by Gas Engine & Power Co.
Rig: Steam screw.
Gross Tonnage: 20. Net Tonnage: 13.

Length: 54.7 feet. Breadth: 10.0 feet. Depth: 4.4 feet.
Service: Passenger. Indicated Horsepower: 70.

Original Cost, to Claimant $17,100.00
Commercial Value, April 6, 1917 ..... $28,428.76

(d) Name of Vessel: "Columbia" Ex-"Hamburg-American Line No. 1."
Official Number: 165548.
Documented under Permanent Enrollment, No. 103, at New York, on October 23, 1916.
Class: Barge. Construction: Wooden.

Original Cost, to Claimant $7,480.00
Commercial Value, April 6, 1917 ..... $12,830.80

(e) Coal Hoister No. 5.
Hull rebuilt by Staten Island Shipbuilding Company 1914.

Original Cost, to Claimant $4,200.00
Commercial Value, April 6, 1917 ..... $7,581.00

[fol. 5] 3. That on or about the sixth day of April, A. D. 1917, at the Port of New York, or in the waters thereof contiguous to claimant's piers at Hoboken, New Jersey, the United States of America by the Treasury Department, acting through United States customs officials, requisitioned or commandeered all of said floating craft and later, to-wit: on April 17, A. D. 1917, turned the same over to the Depot Quartermaster Corps, New York, for the use of the Army Transport Service, the Secretary of War, upon directions from the President, pursuant to the Act of Congress of August 29, 1916, c. 418, sec. 1 (39 Stat. 645), having ordered The Depot Quartermaster, New York, to take possession and assume control thereof, and said floating craft has ever since remained in the custody of the War Department of the United States of America, without any agreement with claimant concerning the compensation to be paid to claimant for its property so taken for public use.

4. That claimant, as a loyal citizen, in view of the national necessity, then existing, which required the acquisition and use of said floating craft by the United States of America, acquiesced in said taking and detention thereof, but by virtue of the provision contained in the Fifth Amendment to the Constitution of the United States, expressed in the words: "nor shall private property be taken for public use, without just comp-nsation," it is justly entitled to have and receive from the United States of America compensation for its property so taken and retained.

5. That claimant founds its claim, on which this suit is brought, upon said Act of August 29, 1916, and upon said provision of the Constitution of the United States, and an implied contract with the Government of the United States, arising out of the facts herein stated and warranting the inference of an agreement on the part of

[fol. 6] said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its said property or for the time of the withholding of said price from claimant since this claim first accrued.

6. That no compensation has at any time been awarded or paid to claimant by the Government of the United States on this claim; that no action has been taken thereon in Congress or in any of the Executive Departments of the United States, other than may have been taken by the War Department in consequence of a letter mailed under date of January 2, 1923, to The Honorable, The Secretary of War, Washington, D. C., a copy of which letter, marked Exhibit "B," is hereunto annexed and made a part hereof, and as indicated by a reply to said letter made by J. M. Wainwright, The Assistant Secretary of War, under date of January 10, 1923, a copy of which reply, marked Exhibit "C," is also hereunto annexed and made a part hereof.

7. That the claimant is the sole owner of the claim set forth in this petition; that no assignment or transfer of said claim or of any part thereof or interest therein has been made; that claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets; that claimant is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way vountarily aided, abetted, or given encouragement to rebellion against the said [fols. 7 & 8] Government; and that claimant believes the facts as stated in this petition to be true.

Wherefore, claimant prays for a judgment in its favor and against the United States of America in the sum of $184,124.66, it being the market value of said floating craft at or about the time same were taken into the custody of the United States of America, as aforesaid, plus interest on said sum from the sixth day of April, A. D. 1917, the date when the possession of said floating craft was taken over to the United States, as aforesaid, and for such other and further relief as to this Honorable Court seems right and equitable.

And, claimant will ever pray, etc.

(Hamburg-American Line Terminal & Navigation Company, Claimant, by George W. Sterling, its Secretary and Treasurer. Hamburg-American Terminal & Navigation Co. Corporate Seal, 1899, N. J.) Charles H. Le Fevre, Attorney for Claimant.

Certificate to foregoing paper omitted in printing.

[fol. 9] (EXHIBIT "A.") CERTIFICATE OF INCORPORATION

This is to certify that the undersigned do hereby associate themselves into a corporation under and by virtue of the provisions of an

Act of the Legislature of the State of New Jersey, entitled "An Act concerning Corporations (Revision of 1896)" and the several Supplements thereto and Acts amendatory thereof, and do severally agree to take the number of shares of capital stock set opposite their respective names:

Article First: The name of the corporation is Hamburg-American Line Terminal & Navigation Company.

Article Second: The principal office in the State of New Jersey, is at No. 60 Grand Street, Jersey City, County of Hudson, and is to be registered with the Corporation Trust Company of New Jersey. The name of the agents therein and in charge thereof, and upon whom process against this corporation may be served, is the Corporation Trust Company of New Jersey.

Article Third: The objects for which and for each or any of which the corporation is formed are,—

I. To carry on the business of warehousemen and wharfingers in all its branches respectively, and in that behalf and for that purpose or otherwise to purchase, acquire, own, construct, hire, use, sell and lease wharves, piers, docks, slips and other terminal property, including lands, tenements and heriditaments in the States of New Jersey and New York and elsewhere in the United States of America and in foreign countries, including their colonies and dependencies, [fol. 10] for the purpose of landing, mooring, loading and discharging sea-going and other ships, vessels, barges, tenders, lighters and boats of any and every nature and description.

II. To transport passengers, property and freight, including cattle, by water, and in that behalf or otherwise to build, purchase, own, charter, operate, sell and lease ships, vessels, barges, tenders, lighters and boats of any and every nature, kind and description, to be operated by steam, sail or otherwise in and between the port of New York and ports of other countries, and in and between other ports of the United States of America, and foreign countries, including their colonies and dependencies, as well as in and between different ports of the United States of America, including the colonies of the same, or otherwise.

III. To apply for and obtain from the Government of the United States of America, or from any other Government the registry, license or enrollment of such ships, vessels or boats of any and every name, nature and description, as may be built, acquired, owned, chartered or operated by the Corporation in and about its business of transporting passengers, freight and property in and between the different ports of the United States of America and their colonies, and in and between ports of the United States and the ports of foreign countries, their colonies and dependencies, or otherwise.

IV. To acquire the good will, business and property, real and personal, including assets of any and every description, and to assume the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock or bonds of this corpora-

tion, or otherwise, and to secure the payment of any bonds or other evidences of indebtedness given therefor, by a mortgage or mortgages covering the real and personal property of this corporation or any part thereof.

[fol. 11] Article Fourth: In furtherance and not in limitation of the general powers conferred by the Laws of the State of New Jersey, and of the objects and purposes as hereinabove stated, it is hereby further expressly provided that the Company shall have the following additional powers and objects, viz.:

I. To do any or all of the things herein set forth as objects, purposes, powers or otherwise to the same extent, and as fully as natural persons might or could do, and in any part of the world, as principals, agents, contractors, trustees or otherwise.

II. To conduct business in all its branches and have one or more offices, and to hold, purchase and convey real and personal property without limit as to amount, both within and without the State of New Jersey, and in all other states, territories and colonies of the United States, including the District of Columbia, and in all foreign countries and places, but subject always to the laws thereof.

III. To manufacture, purchase, or otherwise acquire, hold, own, mortgage, sell, assign and transfer, invest, trade, deal in and deal with goods, wares and merchandise, real estate and personal property and any interests and rights therein and property of every class and description, without limit as to amount, within or without the State of New Jersey, and in any part of the world.

IV. To apply for, obtain, register, purchase, lease or otherwise acquire, and to hold, own, use, operate, introduce, sell and assign, or otherwise dispose of any and all formulæ, trade-marks, trade names and distinctive marks, and all inventions, improvements and processes used in connection with or secured under Letters Patent [fol. 12] of the United States of America, or of any foreign country, and to use, exercise, develop, grant licenses in respect of, or otherwise turn to account any such trade-marks, patents, licenses, concessions, processes and the like, or any such property, rights or inventions so acquired; and with a view to the working and developing of the same, to carry on any business, whether mining, manufacturing or otherwise, which the Corporation may think calculated, directly or indirectly, to effectuate these objects.

V. To hold, purchase, or otherwise acquired, to sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock, bonds or other evidences of indebtedness created by any other corporation or corporations, and while the holder of such stock to exercise all the rights and privileges of ownership, including the right to vote thereon, to the same extent as a natural person might or could do.

VI. To purchase, lease, exchange, hire or otherwise acquire, any and all rights, privileges, permits or franchises suitable or convenient

for any of the purposes of its business; to erect and construct, make, improve or aid or subscribe towards the construction, making or improvement of, mills, factories, storehouses, buildings, roads, docks, piers, slips, wharves, ships, vessels, boats, houses for employes and others, and works of all kinds, and in conjunction with and in furtherance of the general business and purposes of the corporation, as above described, to construct, lease, own, operate or sell a railroad or railroads or both, in any state or country other than the State of New Jersey, subject to the laws of such other state or country, either directly or through the ownership of stock of a corporation, formed or to be formed for the purpose under the laws of such other state or country.

[fol. 13] VII. To guarantee the payment of dividends or interest on any shares, stocks, debentures, or other securities issued by, or any other contract or obligation of any corporation whenever proper or necessary for the business of this corporation in the judgment of its Directors or the Executive Committee.

VIII. To make and enter into contracts of every sort and kind with any individual, firm, association or corporation, whether private, public, or municipal, or body politic, including the Government of the United States, or of any State, territory or colony thereof, and of any foreign country or any colony or dependency thereof.

IX. In general to carry on any other business, whether manufacturing or otherwise, in connection with the foregoing with all the powers now or hereafter conferred by the Laws of New Jersey upon corporations, or by the Laws of any other State or Government to which the Corporation may become subject, and to do all and everything necessary, suitable or proper for the accomplishment of any of the purposes of attainments of any one or more of the objects herein enumerated, or which shall at any time appear conducive to the benefit of the Corporation, either as holders of, or interested in any property or otherwise, including the issuance in that behalf of bonds, debentures and other evidences of indebtedness negotiable or otherwise and the securing the same by mortgage, pledge or otherwise, without limit as to amount.

It is hereby expressly provided and declared to be intended that the foregoing enumeration of specific powers and objects shall not be held or taken to in any wise limit or restrict the objects or powers of the Corporation, but that the objects and powers specified shall be regarded as independent objects and powers.

[fol. 14] Article Fifth. The total authorized capital stock of the corporation is Five hundred thousand (500,000) Dollars, divided into five thousand (5,000) shares of One hundred (100) Dollars each.

Article Sixth. The names of the incorporators, their Post Office addresses, and the number of shares of stock subscribed for by each, the aggregate of which, One thousand (1,000) Dollars, is the

amount of capital stock with which the corporation shall commence business, are as follows:

Name	P. O. address	No. of shares
Emile L. Boas	60 Grand St., Jersey City, N. J.	4
F. George Messmer	207 Palisade Ave., West, Hoboken, N. J.	3
Charles P. O'Swald	60 Grand St., Jersey City, N. J.	3

Article Seventh. The duration of this corporation shall be unlimited.

Article Eighth. The Board of Directors shall have power:

Without the assent or vote of the stockholders to fix the amount to be reserved as working capital.

To authorize and to cause to be executed mortgages and liens without limit as to amount upon the real and personal property of the corporation.

With the consent in writing, or pursuant to the vote of the holders of a majority of the stock issued and outstanding, to sell, assign, transfer or otherwise dispose of the whole property of the corporation, as an entirety.

From time to time to determine whether and to what extent and at what times and places and under what conditions and regulations the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders. And no stockholder shall have any right of inspecting any account or book or [fol. 15] document of this corporation, except as conferred by Statute, or as authorized by the Directors or by a resolution of the stockholders.

Without the assent or vote of the stockholders, to make, alter, amend and rescind the By-Laws of the corporation; but no By-Laws shall be made by the Directors authorizing the sale, assignment, transfer or other disposition of all the property of the corporation as an entirety, except pursuant to the vote of a majority of all the qualified Directors in office at the time.

To designate one or more of their number, from time to time, to constitute an Executive Committee, which Committee to the extent provided in the resolution appointing the same, or by the By-Laws, shall have and may exercise the power of the Board of Directors and the management of the business and affairs of the corporation, and shall have power to authorize the seal of the corporation to be affixed to all papers which may require it.

To hold meetings, to have one or more offices and to keep the books of the corporation, except the stock and transfer books, outside of the State of New Jersey, at such place or places as may from time to time be designated by them.

In addition to the powers by Statute and the By-Laws expressly conferred, to exercise all such powers and do all such acts and things as may be exercised or done by the corporation, but subject, nevertheless, to the provisions of the Statute, of the charter, and to any

regulations that may from time to time be made by the stockholders, provided that no regulations so made shall invalidate any provisions of this Charter.

The Corporation reserves the right to amend, alter or change any provisions contained in this Certificate, in the manner prescribed by Statute, and all rights conferred on Stockholders herein are granted subject to this reservation.

[fol. 16] Article Ninth: The Corporation may use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property, and to the purchase or acquisition of its own capital stock from time to time to such extent, in such manner, and upon such terms as its Board of Directors shall determine; and neither the property nor the capital stock so purchased and acquired, nor any of its capital stock taken in payment or satisfaction of any debt due to the corporation, shall be regarded as profits for the purposes of declaration or payment of dividends, unless otherwise determined by a majority of the Board of Directors.

The Corporation may in its By-Laws confer powers additional to the foregoing upon its Directors, and may prescribe the number necessary to constitute a quorum of its Board of Directors, which may be less than a majority of the same.

Witness the hands and seals of said incorporators this 24th day of October, 1899.

Emil L. Boas [L. S.] F. G. Messmer [L. S.] C. P. O'Swald [L. S.]

In presence of: J. P. Meyer, Julius J. Frank, Solicitor, 27-29 Pine Street, New York. [10c. Internal Revenue Stamp Cancelled.] [10c. Internal Revenue Stamp Cancelled.]

[fol. 17] State of New York,
County of New York, ss.:

Be it remembered that on the 24th day of October, A. D. Eighteen hundred and ninety-nine, before me, the Subscriber, a Commissioner of Deeds for New Jersey residing in New York, personally appeared Julius Paul Meyer, who, being by me duly sworn, on his oath did depose and say, that he saw Emil L. Boas, F. George Messmer and Charles P. O'Swald, the persons named in the foregoing certificate, sign, seal and deliver the same as their voluntary act and deed, and that the deponent at the same time subscribed his name thereto as a witness of the execution thereof.

J. P. Meyer.

Subscribed and sworn to before me the day and year aforesaid. Jno. S. Parker, a Commissioner of Deeds of New Jersey residing in New York. (Seal.)

Endorsed: "Received in the Hudson Co., N. J. Clerk's Office, Oct. 25th, A. D. 1899, and Recorded in Clerk's Record No. —, on page —. John G. Fisher, Clerk. Filed Oct. 26, 1899. George Wurts, Secretary of State."

(Stamped on back: State of New Jersey, Department of State, Comparing and Certification Division. Copy correct. Compared by [fol. 18] J. L. Hendricks. Original read by J. G. Fisher. J. L. Hendricks, in charge of Division.)

State of New Jersey, Department of State.

I, David S. Crater, Secretary of State of the State of New Jersey, do hereby certify that the foregoing is a true copy of the Certificate of Incorporation of Hamburg-American Line Terminal & Navigation Company, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the Twenty-sixth day of October, A. D. 1899, and now remaining on file and of record therein.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal at Trenton, this Second day of April, A. D. 1913.

David S. Crater, Secretary of State. (Seal.)

[fol. 19] EXHIBIT "B"—LETTER OF JAN. 2, 1923

January 2, 1923.

The Honorable the Secretary of War, Washington, D. C.

SIR: At the request of Colonel Thomas W. Miller, Alien Property Custodian, I have been retained by the directors of the Hamberg-American Line Terminal and Navigation Company, corporation created by and existing under the laws of the State of New Jersey, to reduce to the possession of the corporation, or to make recovery of all assets of the corporation, preliminary to a dissolution of the corporation.

All the issued and outstanding capital stock (11 shares) of said corporation was seized during the war by the Alien Property Custodian as being beneficially held for the Hamburg-American Line, a German corporation, and, through his stock control, the Alien Property Custodian elected those who are now the directors and managers of the Hamburg-American Line Terminal and Navigation Company. At the time the United States entered into the war, the property of the New Jersey corporation consisted chiefly of bank deposits, real estate situated at Hoboken, N. J., on which was constructed piers and pier buildings, and some vessel property consisting of two tugboats (Nos. 2 and 3), a lighter ("Columbia," formerly "H.A.L." 1), a steam launch (No. 4), and a coal hoister. All of this property was taken over by the United States Government, and, as I am informed, came under the control of the War Department.

By a Proclamation (No. 1464), made June 28, 1918, the President, pursuant to the provisions of an Act of Congress (Public-No. 109-65th Congress), approved March 28, 1918, took over for the [fol. 20] United States said piers and pier buildings and by a later

Proclamation, issued December 3d, 1918, fixed the compensation to be paid the Hamburg-American Line Terminal and Navigation Company therefor at $2,314,877, which sum a few days later was paid to the corporation, then under the Alien Property Custodian's management.

The Hamburg-American Line Terminal and Navigation Company has not as yet been compensated for the use and occupation of the real estate from April 6, 1917, to June 28, 1918, nor for the vessel property aforesaid.

Will you kindly advise me as to how the directors of the Hamburg-American Line Terminal and Navigation Company, a corporation of the State of New Jersey, can now proceed to effect a recovery for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of the vessel property, or its real value, and compensation for the use of said vessel property while in the possession of the Government.

Very truly yours, (Signed) Charles H. Le Fevre.

[fol. 21] EXHIBIT "C"—LETTER OF JAN. 10, 1923

War Department,

Office of the Assistant Secretary,

Washington, D. C.

ATS-924-LIQ. January 10, 1923.

Mr. Charles H. LeFevre,
Attorney and Counsellor at Law,
Hibbs Building,
725 Fifteenth St., N. W., Washington, D. C.

DEAR SIR: Receipt is acknowledged of your letter of January 2, 1923, relating to property of the Hamburg-American Line Terminal and Navigation Company, a corporation of New Jersey formerly German owned property located at Hoboken, N. J., seized by the Alien Property Custodian during the war.

In regard to the request presented in your letter, I am not prepared at this time, prior to an investigation and examination of the facts in the case, to advise you as to how the directors of the Hamburg-American Line Terminal and Navigation Company may now proceed to effect a recovery, if entitled thereto, for the use and occupation of the pier property at Hoboken, N. J., from April 6, 1917, to June 28, 1918, and of certain vessel property while in possession of the Government. Investigation of this matter, however, will be undertaken at once, the results of which will be communicated to you at a later date.

Very truly yours, (Signed) J. M. Wainwright. J. M. Wainwright, The Assistant Secretary of War.

[fol. 22] III. Defendant's Demurrer—Filed May 26, 1923

Note.—This demurrer was allowed to stand to the Amended Petition.)

Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States.

Robert H. Lovett, Assistant Attorney General. W. F. Norris, Attorney.

IV. Argument and Submission of Demurrer

On February 18, 19 and 20, 1924, the demurrers in this and similar cases, were argued by Messrs. W. F. Norris and Herman J. Galloway, for the defendants, and by Mr. Charles H. Le Fevre, on Feb. 20, for the plaintiff in this case, and the demurrer was submitted.

V. Order of Court Dismissing Amended Petition, and Memorandum—Entered March 17, 1924

This case was submitted upon the defendant's demurrer to the plaintiff's amended petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that said demurrer be and the same is sustained, and the amended petition is dismissed.

Memorandum

1. The action sounds in tort. Ribas v. Hijo Case, 194 U. S., 315; Herrera Case, 222 U. S., 558.

2. The court is without jurisdiction. Cases supra. See also opinion in Deutsch-Australische Dampschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

[fol. 23] VI. Opinion of the Court Referred to in Court's Memorandum

(Decided March 17, 1924)

Deutsch-Australische Dampfschiffs-Gesellschaft,

v.

The United States

Campbell, Chief Justice, delivered the opinion of the court:

This case is before the court upon the defendant's demurrer to the petition, which in substance avers: Plaintiff is a corporation organized and existing under the laws of Germany, and is a citizen of Germany, and at the times mentioned in the petition was engaged in the business of operating steamships, of which it was the owner of many, its principal office and place of business being at Hamburg, Germany. In or about the month of May or June, 1917, pursuant to authority granted by the joint resolution of May 12, 1917 (hereinafter set forth), the President of the United States "took over to the United States the immediate possession and control" of the plaintiff's steamers which then were within the jurisdiction of the United States or its insular possessions and which were the sole and exclusive property of plaintiff and in its possession. The names of the six steamers and the alleged fair and reasonable value of each is stated, and the aggregate value was $9,022,000.

Also it is alleged that certain stores and equipment belonging to the several steamers were also taken over, and that by the taking over of the possession and control of the steamers in the manner stated and "thus appropriating the said steamers to its own use, enjoyment, and benefit," the United States impliedly agreed with plaintiff to pay plaintiff the fair and reasonable value of said steamers, and also for their stores and equipment, but that they have wholly failed and refused to pay the same. It is further averred that the survey required by section 2 of the joint resolution has been duly made and report thereof filed with the Secretary of the Navy. The claim is for the alleged aggregate value of the steamers besides the value of their coal, stores and equipment. A further claim of $10 per deadweight ton per month for each steamer as the value of its use is made in the petition, but the plaintiff abondoned this claim, insisting, however, upon the alleged value of its property. It was explained in argument that the several steamers, with the exception of those in Cuban harbors, were all in American harbors at the outbreak of the war. They were merchant vessels which had sought asylum in these harbors and were left unmolested until the United States entered the war. There were fifteen other suits involving vessels of the alleged aggregate value of over $30,000,000 submitted with this one, besides a large number of similar cases heard at the same time.

[fol. 24] On April 6, 1917, the Congress adopted the joint resolution

declaring the existence of a state of war between the United States and the Imperial Government of Germany. On that day some of the vessels in question were taken into possession and control by agents of the United States Government. On May 12, 1917, the Congress adopted a joint resolution as follows:

"Chap. 13. Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to take over to the United States the immediate possession and title of any vessel within the jurisdiction thereof, including the Canal Zone and all territories and insular possessions of the United States except the American Virgin Islands, which at the time of coming into such jurisdiction was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war when such vessel shall be taken, or was flying the flag of or was under register of any such nation or any political subdivision or municipality thereof; and through the United States Shipping Board, or any department or agency of the Government, to operate, lease, charter, and equip such vessel in any service of the United States, or in any commerce, foreign or coastwise.

"Sec. 2. That the Secretary of the Navy be, and he is hereby, authorized and directed to appoint, subject to the approval of the President, a board of survey, whose duty it shall be to ascertain the actual value of the vessel, its equipment, appurtenances, and all property contained therein, at the time of its taking, and to make a written report of their findings to the Secretary of the Navy, who shall preserve such report with the records of his department. These findings shall be considered as competent evidence in all proceedings on any claim for compensation."

By proclamation dated June 30, 1917, which incorporated the joint resolution of May 12 and mentioned by name 69 German ships, it was ordered by the President that "through the United States Shipping Board there be taken over to the United States the possession and the title of the aforementioned vessels. The United States Shipping Board is further hereby authorized to repair, equip, and man the said vessels; to operate, lease, or charter the same in any service of the United States or in any commerce, foreign or coastwise; and to do and perform any and all things that may be necessary to accomplish the purposes of the joint resolution above set forth."

A question presented at the threshold is whether the Court of Claims has jurisdiction in the premises. The plaintiff contends that

the allegations bring its case within the scope of section 145, Judicial Code, conferring power to hear and determine claims founded upon the Constitution or any law of Congress, or upon implied contract with the United States. The action is not founded upon the Constitution or a law of Congress. The joint resolution authorized the President to take title to the vessels and he did so. It does not in terms declare a liability of the Government or of itself create a right in plaintiff. It was said by Judge Richardson in Ludington's case, 15 C. Cls. 453, that to sustain a claim as one founded on a law of Congress there must be "a statute liability on the part of the Government." See Hukill case, 16 C. Cls. 562. In Hvoslef case, [fol. 25] 237 U. S. 1, 11, the statute authorized and directed the payment of certain claims. The act construed in the Medbury case, 173 U. S. 492, created the right to payment.

Where suits for compensation have been maintained because of the taking by the Government of private property for public use they were not founded upon the Constitution or the Fifth Amendment or a law of Congress, but upon an implied contract arising out of the circumstances of the taking. In United States v. Great Falls Mfg. Co., 112 U. S. 645, one of the earliest cases on the subject, the principle was announced, and it has been repeatedly reaffirmed. In United States v. North American Transportation & Trading Co., 253 U. S. 330, 335, it was said: "The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States." See Tempel case, 248 U. S. 121, 129; Peabody case, 231 U. S. 530, 539; Klebe case, —U. S. —, decided November 12, 1923 (57 C. Cls., 160). The circumstances of the case may rebut the implication of such a contract. Horstmann case, 257 U. S. 138, 146; Ball Engineering Co. v. White & Co., 250 U. S. 46, 67; Klebe Case supra.

It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, § 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239, 242; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852. Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court.

In Brown v. United States, 8 Cranch 110, the Circuit Court had condemned certain pine lumber seized as enemy property. The

court's action was sought to be sustained upon the mere fact of the declaration of war. This the Supreme Court said was not sufficient, but that legislative action was essential to confer upon courts authority to condemn enemy property. Chief Justice Marshall said, page 122: "That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has intraduced into practice, will more or less affect the exercise of this right, but can not impair the right itself. That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court." The court could not pronounce a sentence of condemnation in the absence of legislative authority so to do. In the instant case the court [fol. 26] is asked to order compensation for enemy property seized by authority of a legislative act that is silent on the question of jurisdiction. As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay.

But the limitations or restrictions of the Fifth Amendment do not affect the exercise of the war power conferred upon Congress when enemy property is taken. It was said in Miller v. United States, 11 Wall. 268, 304, that where the statutes were "an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed by the Fifth and Sixth Amendments." (See Herrera case, 222 U. S. 558, 572.) It was added: "The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right." See Morrisdale Coal Co. Case, 55 C. Cls. 310, 315; Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852, 858; Fischer v. Palmer, 259 Fed. 355, 358.

In Green's Case, 10 C. Cls. 466, the facts were that the plaintiff, a citizen of the United States, was dominciled in Nashville, Tennessee. On the 16th day of February, 1862, while the capture of Nashville by the United States Army was imminent and expected, plaintiff went south with a large amount of his firm's moneys, which he took for investment. "While absent from his residence, he was not engaged in giving aid or encouragement to the rebellion other than such as might arise from his voluntarily leaving his domicile and remaining within the Confederate lines and having commercial

dealings with the people." When he left Nashville he was the owner of certain rent-producing buildings occupied by tenants and left in charge of his agent. The agent continued to collect the rents and care for the buildings until December, 1864, when they were seized by the special supervising agent of the Treasury as abandoned property, who collected the rents until July 8, 1865. The suit brought in October, 1870, was to recover these rents. The authority for taking the property was the act of July 2, 1864, 13 Stat. 375, which did not in terms prescribe a remedy. The opinion of the court, delivered by Judge Nott, says that "the case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the abandoned or captured property act," and states the question to be whether the Government is liable for the acts of its officers, done under color of its authority within the insurrectionary district, where the party injured was loyal and the circumstances were such as would give a citizen in time of peace a right of action against the Government under the mandate of the Constitution that private property should not be taken for public [fol. 27] use without just compensation. Declaring that it made no difference in the applicable rule whether the property was taken by the Army or the Navy, or by an officer of the Treasury, the court concluded that the Government was not liable upon implied contract. The court said (p. 471): "It is inevitable that a war must be prosecuted rigorously, and it is desirable that it be prosecuted as little to the injury of a government's own citizens as possible. In the prosecution of a war the discretion of a government, so far as the enemy is concerned, takes the place of ordinary constitutional restrictions or statutory provisions."

To relieve the rigor of the situation, the act of March 12, 1863, commonly called the abandoned or captured property act, was enacted. It was a beneficent piece of legislation and speaking of it, the court say in Klein's Case, 13 Wall. 128, 138: "There is, so far as we are aware, no similar legislation mentioned in history." It created a right where none existed before, Anderson Case, 9 Wall. 56, and authorized suits under specified conditions for the proceeds of sales of property that had been taken or seized as "enemy property." Although it was recognized, as was said in Lamar v. Brown, 92 U. S. 187, 195, that the United States, during the Civil War, occupied the position of "both belligerent and constitutional sovereign," it was also recognized, and uniformly held, that it was only in virtue of the act mentioned that even the loyal citizen, whether he resided in the one or the other of the sections, could assert in the Court of Claims compensation for his property that had been seized or appropriated as enemy property. The theory of an implied contract arising out of such seizure or appropriation finds no support in the decided cases. In Young's Case, 97 U. S. 39, 67, it was said of the British subject, in whose right the suit was brought: "Collie has been deprived of no right he ever had. Neither he nor any one similarly situated has ever been permitted to sue the United

States in their own courts upon such a claim." See Klein Case, 13 Wall. 128, 137; Moore Case, 10 C. Cls. 375, 383; Haycraft Case, 22 Wall. 81, 92; Hijo Case, 194 U. S. 315.

In the Herrera Case, 43 C. Cls. 430, the plaintiff insisted that there was an implied contract, but this court held it had not jurisdiction under the Tucker Act, and quoted from the Hijo Case, 194 U. S. 315, 320, where it is said: "The vessel was therefore to be deemed enemy's property. It was seized as property of that kind for purposes of war and not for any purposes of gain." The judgment was affirmed by the Supreme Court. In the course of their opinion, reference is made to the modern rules of war, stated by Kent (1 Kent, 92, 93), and which are in substance urged here, and the opinion proceeds: "If the record presented such a case, the question could be raised whether it presented one for judicial cognizance, even if a court could share the indignation which the learned commentator says all mankind would feel. It is certain that the court's power can not be enlarged by its emotions. Herrera Case, 222 U. S. 558, 572.

The second section of the resolution directed that a survey be made, the results of which should be competent evidence in any proceedings for compensation. This provision is entirely consistent with the idea that Congress intended to reserve for future determination any question of compensation. It falls short of conferring power [fol. 28] upon this court to determine it. It is significant when the policy of legislation during the war is considered that provision was made for action against the Government in all cases where it was intended to confer the right. Notwithstanding this court had the power to hear and determine suits against the Government conferred by section 145 of the Judicial Code, the numerous statutes authorizing requisitions and the taking of private property expressly designated the court where suits could be brought. Some of these conferred jurisdiction on the Court of Claims; some on District courts, and some on both of these courts. Mr. Justice Brandeis, in the Pfitsch case, 256 U. S. 547, 552, says: "A survey of the war legislation permitting the seizure of property discloses that Congress has established three distinct jurisdictions for the purpose of suit against the United States for compensation." He mentions 25 different instances. The Government can not be sued without its consent, and the power to hear and determine suits against the United States should not and does not rest in mere inference or implication. It was said in Haycraft's case, 22 Wall. 81, 92: "A sovereign can not be sued in his own courts except with his consent. This is an action against the United States in its own Court of Claims. The appellant must, therefore, show that consent has been given to its prosecution." Every court must take notice of the limits of its jurisdiction. Reid case, 211 U. S. 529. It was suggested in argument in some of this class of cases that the Government took charge of the railroads under provisions of the national defense act, which did not prescribe a method for ascertaining compensation. But this action taken in an emergency was followed by a statute,

which provided the necessary forum. The trading with the enemy act authorizing the Alien Property Custodian to take over and to dispose of enemy property did not permit suits by the enemy owners. Nor does the joint resolution of May 12 authorize suits by the German owners of the vessels. If this resolution can be made the basis of the suits they could have been instituted as soon as the President took action under it. Can it be supposed that the Government intended to open its courts to enemies seeking compensation for property taken from them while the war was yet flagrant? The history of the enactment rebuts any such idea. A joint resolution was introduced and referred in the Senate and in the House. As reported to the Senate by its committee, the joint resolution contained five sections. (Cong. Rec., vol. 55, pt. 2, p. 1572.) The first two sections contained all that was finally adopted. The three other sections purported to authorize suits to be brought by parties interested in the vessels and had provisions relative to suits. By section 5 the suits could be brought in the Court of Claims. All of sections 3, 4, and 5 thus reported were stricken out by amendment in the Senate. (Cong. Rec., vol. 55, pt. 2, p. 1575.) An amendment proposed by Senator Knox authorizing the President to "requisition" the vessels was voted down. (Cong. Rec., vol. 55, pt. 2, pp. 1575, 1576.) The joint resolution as amended was adopted by the Senate, and in that shape was sent to the House, where it was taken up, superseding the one on its calendar, and passed as it came from the Senate. This definite action by the Senate, concurred in by the House, confirms the view that there was no intention to authorize [fol. 29] suits in the Court of Claims on account of the seizure of these vessels. See Pfitsch case, supra.

The plaintiff argues that the United States did not confiscate or intend to confiscate the property and that the taking must consequently be referred to the power of eminent domain with a duty to make compensation. What we have said sufficiently answers this contention. We do not think it necessary to assert that there was a confiscation, nor to deny that the Congress may have intended that the United States would at some time account for the vessels or their ascertained value. If this court is without jurisdiction, its conclusions upon these questions would probably be coram non judice. The result, however, in this case, would not be altered if the proper conclusion were that the taking over of the vessels amounted to a sequestration of them. The act authorizing their seizure did not confer power on the Court of Claims to entertain the present suit, nor does its general jurisdiction extend to suits of this kind. It was said in Haycraft's case, supra: It is for Congress, not the courts, to determine whether this jurisdiction shall be extended and other remedies provided."

The demurrer should be sustained. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge, and Booth, Judge, concur.

[fol. 30] VIII. Proceedings After Entry of Judgment

On May 15, 1924, the plaintiff filed a motion for a new trial. On May 26, 1924, the court filed an order overruling said motion.

VIII. Plaintiff's Application for Appeal—Filed June 4, 1924

From the judgment rendered in the above-entitled cause on the seventeenth day of March, 1924, in favor of the defendant, and from the decree entered in said cause on the twenty-sixth day of May, 1924, overruling claimant's motion for a new trial, the claimant, by its attorney, on this fourth day of June, 1924, makes application for, and gives notice of, an appeal to the Supreme Court of the United States.

Charles H. Le Fevre, Attorney for Claimant.

Ordered: That the above application for appeal be allowed as prayed for.

By the Court.

Entered June 16, 1924.

[fol. 31] [Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of the case on demurrer; of the order of the court dismissing the amended petition, with memorandum by the court; of the opinion of the court referred to in court's memorandum; of the proceedings after entry of judgment; of the plaintiff's application for an appeal and of the allowance by the court of said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Eighteenth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal Court of Claims.)

Endorsed on cover: File No. 30,441. Court of Claims. Term No. 476. Hamburg-American Line Terminal & Navigation Company, appellant, vs. The United States. Filed June 25th, 1924. File No. 30,441.